

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 SMITH & NEPHEW, INCORPORATED, )  
4 and JOHN O. HAYHURST, M.D., )

5 Plaintiffs, )

6 vs. )

7 ARTHREX, INCORPORATED, )

8 Defendant. )  
\_\_\_\_\_ )

No. CV-04-29-MO

No. CV-08-714-MO

April 5, 2010

Portland, Oregon

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13 **Telephone Status Conference**

14 TRANSCRIPT OF PROCEEDINGS

15 BEFORE THE HONORABLE MICHAEL W. MOSMAN

16 UNITED STATES DISTRICT COURT JUDGE  
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## APPEARANCES

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ALSO PRESENT: Mr. John Schmieding

1 (P R O C E E D I N G S)

2 THE CLERK: Hello, Counsel.

3 We are here today in Smith & Nephew v. Arthrex.  
4 Judge Mosman is presiding.

5 Please state your appearances for the record.

6 MR. SKENYON: This is Jack Skenyon, appearing for  
7 the plaintiffs, Smith & Nephew and John Hayhurst.

8 MR. HEBERT: This is Mark Hebert, also appearing  
9 for the plaintiffs.

10 MS. PITCHFORD: And Susan Pitchford, also for  
11 plaintiffs.

12 MR. SABER: This is Charles Saber, appearing for  
13 defendant Arthrex.

14 MR. HEUSER: Peter Heuser, also appearing for  
15 defendant Arthrex.

16 MR. CHO: Anthony Cho, also for defendant Arthrex.

17 THE COURT: Mr. Schmieding, are you on the phone  
18 also? I had a record that --

19 MR. SCHMIEDING: This is John Schmieding. I'm on  
20 the call, too. I have it on mute, though.

21 THE COURT: All right. Thank you. You can go  
22 ahead and put it on mute again, unless my daughter is  
23 calling in and I didn't know.

24 We're here on the parties' joint status report,  
25 with some suggestions from each side as to how we ought to

1 proceed going forward. I think the parties are in general  
2 agreement on the meaning of the Federal Circuit's decision,  
3 at least the bare meaning of it. I have received your  
4 suggestions. I'll hear anything further you wish to add in  
5 light of what others have said.

6 And so I'll start with Smith & Nephew. Anything  
7 further you wish to add?

8 MR. SKENYON: No, not other than anything we put  
9 in the report, no.

10 THE COURT: And for Arthrex, anything further you  
11 wish to add?

12 MR. SABER: At least right now, not right now.

13 THE COURT: I should note that as of today, the  
14 Federal Circuit's mandate has been docketed, so that's  
15 happened. We've made some progress.

16 There are several questions. The parties  
17 certainly agree that the former definition of "resile" and,  
18 for that matter, "resilience" has been altered by the  
19 holding of the Federal Circuit.

20 There is disagreement, first of all, about whether  
21 that Federal Circuit ruling puts other claim construction  
22 rulings by this Court in play or not. Smith & Nephew argues  
23 that since no other claims were contested, prior rulings by  
24 this Court are now law of the case.

25 I think that's true as far as it goes, with the

1 obvious exception that at appropriate points it's necessary  
2 to plug in the new definition of "resilience" or "resile"  
3 where necessary.

4 Arthrex goes a little bit further than that, at  
5 least if I'm understanding their argument, to suggest that  
6 other claim constructions now have to be reexamined in light  
7 of the altered claim construction, and uses as examples  
8 "forming a hole in the bone" and "lodging the member within  
9 the hole."

10 I disagree that anything more than the new claim  
11 construction from the Federal Circuit and plugging that  
12 definition in where absolutely necessary in redefining other  
13 claims is all that's going to happen here. I'm not going to  
14 reexamine other claim construction, not only because I don't  
15 think it's a good use of the time at this late date, but  
16 because I agree that, in essence, it's the law of the case.

17 So that's claim construction.

18 MR. SABER: Your Honor, may I be heard briefly on  
19 that? This is Mr. Saber.

20 THE COURT: Differently than what you've written?

21 MR. SABER: Just to amplify a bit on what was  
22 written, if I could.

23 THE COURT: Go ahead.

24 MR. SABER: The law of the case doctrine is a very  
25 narrow -- it's a narrow doctrine and it is -- there are

1 many, many exceptions to the doctrine, that indeed if an  
2 exception applies, it's an abuse of discretion not to follow  
3 that.

4 Here there are at least two or three that do  
5 apply. We think that there is a change of circumstance and  
6 a change in law, because the change of the claim  
7 construction, which is a matter of law, if indeed we are  
8 correct that it impacts upon these other two matters of  
9 "forming a hole" and "lodging by pressing," then indeed I  
10 think it's incumbent upon the Court to reconsider those  
11 issues.

12 I will note that actually with "forming a hole,"  
13 there really wasn't a construction.

14 With "pressing" -- or at least a construction that  
15 went to this issue.

16 On "pressing," of course, there was.

17 But we think that in the way that the Federal  
18 Circuit described how the '557 patent works -- that a  
19 surgeon makes a hole and then presses into the holes, and  
20 then the resilient legs of the holes (sic) are what expand  
21 to secure the anchor within the hole -- that that is the  
22 Federal Circuit's teaching from the patent that it's not the  
23 expansion of the hole but the expansion of the legs that has  
24 to cause the lodging, and that brings these other two  
25 matters of "forming the hole" and "lodging by pressing"

1 directly into -- into being.

2 And since law of the case is a narrow doctrine, we  
3 believe that these changes make it incumbent upon the Court  
4 to reconsider those, reconsider on "pressing" and to have  
5 additional claim construction on "forming the hole."

6 THE COURT: Thank you. I'm not going to do so.  
7 We'll stick with the prior claim construction unless it's  
8 directly altered by the Federal Circuit's ruling.

9 The second issue is infringement, and the -- Smith  
10 & Nephew position is that the only remaining infringement  
11 question is whether the accused anchors meet the new  
12 definition of "resiles."

13 Arthrex suggests, without a lot of specificity,  
14 that there may be new infringement arguments that need to be  
15 considered. If I understand the argument, it would be that  
16 new claim construction might give rise to new infringement  
17 arguments that would need to be considered.

18 I'm not going to have new claim construction. I  
19 don't see new infringement arguments in play in this case,  
20 other than the question of whether I ought to issue some  
21 ruling on the merits on *BMC Resources*.

22 Arthrex contends that I ought to completely forego  
23 any examination beyond what happened earlier of -- excuse  
24 me, Smith & Nephew contends that I ought to forego any  
25 examination on the merits of *BMC Resources*, and Arthrex

1 contends that nothing, certainly in the Federal Circuit  
2 ruling, prohibits me from doing so, and that much by way of  
3 intervening events and changes in the law counsel me to do  
4 so.

5 We are headed for dispositive motions of some  
6 kind, and I will take briefing on the merits on the question  
7 of *BMC Resources*. When I say "on the merits," I guess I  
8 should say directly on the merits, although I will invite  
9 Smith & Nephew to go ahead and also brief, if it chooses to  
10 do so, any argument that I should not reconsider for some  
11 sort of law of the case reason *BMC Resources*, my ruling on  
12 *BMC Resources* earlier, or that if I do so, I ought to  
13 continue not on the merits but on a waiver basis to deny  
14 Arthrex that argument.

15 But I am going to require from Arthrex, and a  
16 response by Smith & Nephew also, direct briefing on the  
17 merits of *BMC Resources* on their argument.

18 So I'm declining at this point to foreclose  
19 dispositive motions briefing on *BMC Resources*.

20 That's infringement.

21 Smith & Nephew suggests that there are no new  
22 validity arguments that should be raised and that the  
23 Federal Circuit has affirmed this Court's ruling on prior  
24 validity and unenforceability arguments. And in light of my  
25 ruling about claim construction, I don't see new validity



1 arguments that could be raised at this time.

2 Let's talk about summary judgment. Again, from  
3 what I've said already, Smith & Nephew suggests it ought to  
4 be solely on the issue of whether the accused anchors  
5 infringe the '557 patent on the narrower definition of  
6 "resiles." And I've suggested that in addition to that  
7 question -- in fact, I have some doubt about whether that  
8 question is susceptible to summary judgment or not, but in  
9 addition to that question, we'll also brief the *BMC*  
10 *Resources* question.

11 Smith & Nephew suggests that summary judgment  
12 briefing should be resolved based on evidence produced at  
13 the last trial only, and Arthrex suggests that it ought to  
14 be the full record from both trials. And I agree with  
15 Arthrex. I see no reason to limit summary judgment briefing  
16 to the evidence produced at the last trial.

17 Arthrex, of course, further contends that it ought  
18 to be based on expanded claim construction, with which I  
19 disagree. And as I've said now already, I agree with  
20 Arthrex's position that summary judgment ought to include  
21 the *BMC Resources* issue. So I know we'll have briefing on  
22 *BMC Resources*.

23 I want to turn briefly to the one part of summary  
24 judgment the parties seem to agree about, which is that we  
25 ought to have cross motions for summary judgment on whether

1 the evidence, even viewed in the light most favorable to the  
2 non-moving party, fails to or absolutely shows infringement  
3 under the revised claim construction.

4 Arthrex would like to move, from what I can tell  
5 from the briefing at least, for summary judgment on the idea  
6 that the new definition of infringement should result in  
7 summary judgment on non-infringement in Arthrex's favor.

8 I have trouble figuring out how we get around, in  
9 terms of summary judgment briefing on the question, how we  
10 get around the Federal Circuit's, as I read it, the holding  
11 that reasonable jurors could disagree, could find  
12 infringement even under the revised claim construction.

13 So I'll turn to Arthrex first. On what basis  
14 would you be moving for summary judgment for  
15 non-infringement in light of the Federal Circuit's new claim  
16 construction?

17 MR. SABER: Thank you, Your Honor.

18 I mean, there are actually several reasons why we  
19 say that. The issue in the Federal Circuit really was on a  
20 very, very narrow record as it goes to this question because  
21 Smith & Nephew had never made this argument that they made  
22 at oral argument about harmless error. So the Federal  
23 Circuit simply just did not have the opportunity to have the  
24 full record about the evidence that had been developed below  
25 on the nature of the Smith & Nephew tests that allegedly

1 show resilience sufficient to lodge.

2 THE COURT: Where does the Federal Circuit say  
3 they didn't have the opportunity to do that?

4 MR. SABER: Excuse me?

5 THE COURT: Where does the Federal Circuit say  
6 that it didn't have the opportunity to review the record?

7 MR. SABER: Well, I don't think you'll find that  
8 in the opinion. I think that was -- there was a long oral  
9 argument on there as well. But we think that when the full  
10 record is brought up, there are significant admissions by  
11 Smith & Nephew that the kinds of tests that they're relying  
12 upon simply cannot be used to show how much of the alleged  
13 force came from resilience and how much of the alleged force  
14 came from something else. There is also several other  
15 reasons why, but that's probably the single most important  
16 one.

17 In addition, there was actually no evidence put in  
18 by the -- by Smith & Nephew that there was sufficiency to  
19 lodge under any of their tests. What we did have was just  
20 an attorney argument. And, indeed, the -- for example, the  
21 evidence that was developed in the full record is that the  
22 parties agreed that the amount of resilience that you would  
23 need to lodge is between 10 and 15 pounds. None of that was  
24 before the Federal Circuit. None of that was, frankly,  
25 appropriate to be before the Federal Circuit at the date we

1 had the argument.

2           There is also the fact that there are many factors  
3 other than just the difference between -- this was on the  
4 plastic versus metal, things other than resilience. And  
5 again, on a full record, which we believe that really what  
6 the Court was instructing is that we don't have the evidence  
7 here, and we think that it's appropriate on a full record  
8 for this Court to consider whether in fact we should be  
9 going forward or whether this matter can now be resolved at  
10 this time.

11           THE COURT: Turning to Smith & Nephew, I'm also  
12 puzzled, thinking of summary judgment going your direction,  
13 how I would grant summary judgment to Smith & Nephew without  
14 going contrary to my rulings earlier for directed verdict or  
15 other such -- for summary judgment, for that matter, or  
16 perhaps, if I'm recalling correctly, post-trial motions.  
17 I'm at a loss how I would come out differently without  
18 essentially talking out of both sides of my mouth for  
19 summary judgment on this narrower construction in Smith &  
20 Nephew's favor.

21           MR. SKENYON: Well, I think, Your Honor, that when  
22 we're talking about post-trial motions, we're talking about  
23 their post-trial motions. They were asking you to rule for  
24 non-infringement, and the argument there was that -- on our  
25 side, was simply that there was not evidence for the jury to

1 conclude otherwise. So I don't think that's quite the same  
2 thing as going against your ruling there, because as a  
3 practical matter, if you ruled for the fact that we were  
4 entitled to summary judgment on infringement, there would be  
5 some consistency with that.

6 I think from the point -- our point of view here  
7 is that based on the record that existed in the last  
8 trial -- and I disagree with Mr. Saber on some of the things  
9 he said as to what that record constituted and what was  
10 before the Federal Circuit -- that we had directed our  
11 attention towards establishing a significant level of  
12 lodging power that was attributed just to the resilience of  
13 their anchors based on the testimony actually of their  
14 expert witnesses and the tests done by their experts.  
15 Essentially, under the circumstances, while this was in fact  
16 set forth for the Federal Circuit in our briefing as to what  
17 that evidence was, the Federal Circuit just did kick it back  
18 to this Court. So I don't think it's inappropriate to  
19 consider that. Now, maybe after all is said and done, the  
20 Court still considers the fact that there's some genuine  
21 issue of material fact here, but as a practical matter, we  
22 think there certainly is a basis to make the motion in the  
23 first place.

24 THE COURT: My real question was whether you view  
25 yourself as ever having made essentially the same argument

1 once already.

2 MR. SKENYON: You know, I can't really answer that  
3 question right now. I know that in connection with the  
4 post-trial motions, our argument was that there was  
5 sufficient evidence to support the verdict.

6 In terms of the directed verdict motion, I think  
7 we just made that in general, and the Court just denied all  
8 of those, but I don't remember much argument on the directed  
9 verdict motions at trial at this time.

10 THE COURT: Thank you.

11 In terms of summary judgment, then, I will simply  
12 entertain briefing on the question of whether the accused  
13 anchors infringed the '557 patent on the Federal Circuit's  
14 narrower definition of "resile," and the *BMC Resources*  
15 question. The parties are free to move for cross motions  
16 for summary judgment, and that will be our summary judgment  
17 phase of the case without any new claim construction phase.

18 The parties also have brought up the question of  
19 trial and damages. I have a couple of questions about that.  
20 Let me come to those in a moment, though, because in  
21 connection with what might happen between summary judgment  
22 and trial, Arthrex at least has raised the issue of what to  
23 do about experts, and for that matter Smith & Nephew has  
24 suggested that if summary judgment is denied Smith & Nephew,  
25 that we ought to proceed on the prior expert reports without

1 any additional expert presentation.

2 I'm aware that I could wait until after summary  
3 judgment one way or the other to go ahead and set this up,  
4 but the parties have set themselves a fairly rapid exchange  
5 of reports and the like, and I'm under the impression that  
6 some prep work would need to be done in order to meet that  
7 schedule. So I'm going to take up now the question of  
8 expert discovery, if any, following summary judgment.

9 First I raised the question -- from what you've  
10 written, it appears that the parties are content to move  
11 forward towards summary judgment simply based on the  
12 existing record without reliance on anything new from any  
13 experts. Is that correct for Smith & Nephew?

14 MR. SKENYON: Yes, it is, Your Honor.

15 THE COURT: And for Arthrex?

16 MR. SABER: Yes, Your Honor.

17 THE COURT: Then that's what we'll do.

18 Assuming that both sides lose at summary judgment,  
19 that I deny both sides' summary judgment, which is probably  
20 a pretty safe assumption at this point, then what to do  
21 about additional expert testing and reports? As I've  
22 mentioned, Smith & Nephew suggests that we could simply  
23 forego anything new and that what Arthrex presented earlier  
24 ought to be enough.

25 I disagree. I agree with Arthrex's position that

1 it really couldn't have presented evidence earlier that  
2 resilience, even if it contributed in part, was not  
3 sufficient to lodge. And that's the precise evidence that  
4 it now wishes to present, evidence that if it had tried to  
5 present it earlier, I would have blocked.

6 So we are going to need new expert reports. I  
7 don't know if we'll need new expert testing or not. I'll  
8 leave that to the parties. But we will need new expert  
9 reports to support whatever happens on new -- the new claim  
10 construction, moving forward towards trial.

11 Arthrex has suggested that as to infringement,  
12 which is the real issue now, that we ought to follow the  
13 pattern of disclosure used in the second trial, and that as  
14 to any other expert issues -- and I see none, I'm not  
15 allowing any -- we ought to follow the pattern used at the  
16 first trial. After that presentation, it proposes a single  
17 schedule for expert discovery.

18 So my question to Arthrex is, is that the schedule  
19 you're suggesting for expert disclosure, testing and the  
20 like, with regard to infringement? And I'm looking now at  
21 page 11 of the joint status report.

22 MR. SABER: That's right. That's our proposal,  
23 Your Honor. Again, with the first reports would be  
24 simultaneous, 75 days after, if the Court were to deny both  
25 parties' motions.



1 THE COURT: And you're incorporating within that  
2 the schedule you suggest on page 10 for inspection of test  
3 materials and the like?

4 MR. SABER: That's correct. What we suggested, to  
5 make clear, is that if parties do tests, that they produce  
6 the information at the same time, and that if there's an  
7 inspection, within 14 days, that's correct.

8 THE COURT: For Smith & Nephew, since I am going  
9 to allow additional expert reports in this case, do you have  
10 any problem with the schedule laid out on page 11?

11 MR. SKENYON: None with the schedule per se, but  
12 with the procedure.

13 THE COURT: What problem do you have with the  
14 procedure?

15 MR. SKENYON: Well, the problem with the procedure  
16 was that last time, before the second trial, the parties  
17 exchanged infringement reports at the same time, which was  
18 fine. Each of the reports included testing that the  
19 expert -- the respective expert had done. The rebuttal  
20 reports which were exchanged at the same time were supposed  
21 to be directed to criticisms of the testing that the other  
22 expert had done. In the case of Arthrex's expert, however,  
23 there was a new round of testing in that.

24 As we bear the burden on this infringement  
25 question, it is somewhat unfair, from our point of view, to

1 be confronted at that stage in the rebuttal reports with a  
2 new round of testing by Arthrex that we cannot either  
3 duplicate or respond to. So if you're going to do it this  
4 way, our suggestion would be that the rebuttal expert  
5 reports do not include any new testing, or the alternative  
6 would be if they include new testing, we get the last reply.

7 THE COURT: And you mean new testing, not an  
8 attempt to duplicate the testing of the opposing expert?

9 MR. SKENYON: No, I would say not -- well, the  
10 problem is when you say, "duplicate the testing of the  
11 opposing expert," it depends on how you do that as to  
12 whether that's new or not. Did you change the parameters  
13 any? Did you use a different substrate? Did you do  
14 something else with that, makes that a little subjective  
15 question as to what that testing is.

16 THE COURT: All right. Thank you. Thank you.

17 I will adopt the schedule at page 11, with  
18 incorporating the 14-day time line at page 10 regarding  
19 testing materials, equipment and the like.

20 Smith & Nephew doesn't really have a problem with  
21 the schedule, they have a problem with how it played out  
22 last time. I agree with that concern, and rebuttal expert  
23 reports are not to include new testing. They may include  
24 precise duplication of opposing experiments or tests as just  
25 a pure attempt to see if it can be duplicated.

1           What is meant by "expert discovery deadline" at  
2     page 11?

3           MR. SABER: Your Honor, it's Mr. Saber. That's  
4     for depositions following the reports.

5           THE COURT: And any problem with that deposition  
6     deadline from Smith & Nephew?

7           MR. SKENYON: We don't see any, Your Honor.

8           THE COURT: So I'll adopt those three parts at  
9     page 11 to expert discovery, the initial simultaneous  
10    exchange of expert reports and disclosure of testing and  
11    experimental procedures and materials, with corresponding  
12    opportunities to inspect by the opponents, rebuttal expert  
13    reports, which do not include new testing, but may include  
14    precise duplication of testing, and then any depositions to  
15    follow the rebuttal reports by 60 days. That's what we'll  
16    do about experts, assuming both sides lose at summary  
17    judgment.

18           I want to take up the question of damages and  
19    trial briefly. Again, recognizing that we're in a sort of a  
20    hypothetical situation, I still think it might be fruitful  
21    for all of us to move forward that far in the schedule.

22           Smith & Nephew suggests that if they win at  
23    summary judgment, the Court ought to reinstate the prior  
24    damage award. And on that narrow scenario -- not more  
25    generally, but just on the narrow scenario of Smith & Nephew

1 prevailing at summary judgment -- does Arthrex disagree with  
2 that proposition that if Smith & Nephew wins, I reinstate  
3 the prior damage award?

4 MR. SABER: Yes, Your Honor, we do. The judgment  
5 has been reversed, and I -- we obviously have the right on  
6 whatever record is now at trial, if there is subsequently a  
7 trial, to contest the damages as well.

8 THE COURT: All right. Thank you. Thank you.  
9 I'm not sure I agree, but we'll cross that road if and when  
10 we get to it.

11 And then on damages more generally, of course, I  
12 think both sides agree that, assuming we go to trial, we  
13 have incorporated into the trial the question of damages.

14 Yes, sir?

15 MR. SKENYON: Your Honor, that would be Smith &  
16 Nephew's position. I think the Seventh Amendment would  
17 require that.

18 THE COURT: What Smith & Nephew further suggests  
19 is that we ought to also move forward on the question of  
20 supplemental damages from January 1, '06 to June 11, '08, in  
21 order, I guess in part, to cure Smith & Nephew's cross  
22 appeal which the Federal Circuit found moot.

23 And I'm not sure we're talking about the same  
24 damage piece here, but Arthrex suggests that that is Smith &  
25 Nephew simply inviting me to reconsider my prior ruling on

1 supplemental damages.

2 Am I understanding Arthrex's position correctly?

3 MR. SABER: Yes, Your Honor.

4 THE COURT: And your response for Smith & Nephew?

5 MR. SKENYON: Well, it is -- it would be a  
6 question of if summary judgment was granted on our behalf on  
7 infringement, and the original one was -- the damages award  
8 was reinstated, there would be damages due from that earlier  
9 date, that January, I think, '06 date on forward, continuing  
10 to the present, actually. And that would be required to be  
11 tried, I think, in a brief -- we suggest a brief trial to a  
12 jury. It's not a question of the Court's previous ruling,  
13 it being revisited that in the previous trial the damages  
14 numbers weren't put in for a period of time because that's  
15 in effect superseded here.

16 THE COURT: Why do you suggest that following this  
17 procedure would, as you put it, cure Smith & Nephew's cross  
18 appeal?

19 MR. SKENYON: Well, because theoretically at that  
20 damages trial, we would put in all the missing damages  
21 numbers from 2006 up until the present day of that trial,  
22 and the issue on the cross appeal was that for some period  
23 of time, up and to the -- up until the trial, those damages  
24 numbers were missing and the Court would not issue any  
25 damages award for them.

1           So if the jury decided the damages question,  
2           however it did, dealing with all the damages numbers, no  
3           matter what they came up with, would eliminate the cross  
4           appeal issue.

5           THE COURT: All right. Thank you. I believe I  
6           understand your -- each side's damages position better.

7           At trial itself, again assuming a denial of  
8           summary judgment, Smith & Nephew suggests a trial on the  
9           limited infringement issue plus some degree of damages, and  
10          also consolidating with 08-0007 with experts limited to  
11          prior reports. That's the trial Smith & Nephew envisions.

12          Arthrex envisions a trial on infringement. I've  
13          made clear it's on the limited question of infringement. We  
14          may also have a trial question for the jury on the *BMC*  
15          *Resources* issue. It will not be limited to prior expert  
16          reports. And Smith & Nephew -- excuse me, Arthrex suggests  
17          that we ought not to consolidate with 08-0007.

18          In my own view, the trial -- again, assuming a  
19          denial of summary judgment, would involve the limited  
20          infringement issue, plus *BMC Resources*, with new expert  
21          reports, but no consolidation with 08-0007, since they're in  
22          very different postures.

23          So with that in mind, the parties have suggested  
24          not only a schedule for disclosure of experts, but a  
25          schedule for moving forward through summary judgment.

1 Give me just a moment here.

2 (There is a pause in the proceedings.)

3 THE COURT: So first let me clarify. I said 0007.  
4 It's actually all those zeros, 714. I'm sure no one  
5 misunderstood.

6 The parties have suggested a briefing schedule for  
7 summary judgment, with summary judgment motions, cross  
8 motions coming due May 14, 2010; oppositions, June 4, 2010;  
9 and replies June 18, 2010. I'm happy with that schedule.  
10 I'll adopt it as the summary judgment schedule in this case.

11 I don't know how quickly we'll be able to get  
12 summary judgment resolved here, but I'm willing to try to  
13 entertain a trial date so that we can lock that in at this  
14 point.

15 Have the parties had a chance to discuss potential  
16 trial dates?

17 MR. HEBERT: No, we haven't, Your Honor.

18 MR. SABER: That's correct, Your Honor.

19 THE COURT: Do you want to try to do that now?  
20 You've set out a schedule going out quite some distance from  
21 resolution of summary judgment before trial. So I'm  
22 guessing, without having done -- crunched the numbers, that  
23 we're talking about a 2011 trial. Is that right?

24 MR. SKENYON: We didn't know what your schedule  
25 was like, but I think we had been assuming that that would

1 be so.

2 THE COURT: If I got the final brief the end of  
3 June, then I typically allow myself a maximum of four months  
4 to resolve summary judgment; that is, to assimilate the  
5 briefing and hold a hearing if necessary and then answer it.  
6 Assuming that occurred here, then we'd be at the end of  
7 October or the middle part of October for summary judgment.  
8 With the schedule we talked about a moment ago,  
9 essentially --

10 MR. SABER: I think it's about six months for  
11 expert discovery, if I'm adding the numbers up right.

12 THE COURT: That's about right, maybe five, but  
13 yeah, we'll call it six months later to finish up expert  
14 discovery. And then you'd have witness and exhibit lists  
15 and the like.

16 So I'm happy to let you discuss that offline and  
17 propose dates to me. That's far enough out that although  
18 I'm not completely blank, I have a pretty good selection of  
19 dates available. I suspect if you gave me two or three  
20 dates that the parties could try this case, one of them  
21 would work for sure.

22 Do you want to do that or do you want to hammer it  
23 out right now?

24 MR. SABER: May I suggest that the parties talk  
25 and by the end of the week see if we can either come to



1 agreement and/or if we have different suggestions, send it  
2 by letter to the Court?

3 MR. SKENYON: Or maybe multiple dates that we  
4 could suggest.

5 THE COURT: Well, that's what I'm asking you to  
6 do. Come up with at least two, maybe three dates.

7 I'm going to put you on hold for just a moment  
8 here.

9 (There is a pause in the proceedings.)

10 THE COURT: Counsel, the only sticking point for  
11 me then is that in the first three weeks of May, I have a  
12 big securities trial, but April is wide open, late March is  
13 wide open, and if it had to be that, early June wide open.

14 So talk to each other and suggest by an e-mail to  
15 Ms. Stephens dates that might work for trial in this case.

16 MR. SABER: Do you have anything after June? I  
17 think the earlier dates are going to be too tight with the  
18 expert.

19 THE COURT: Later than June or in June?

20 MR. SABER: Yeah, in June and going forward from  
21 there.

22 THE COURT: June is wide open. Early July is  
23 open. I don't want to go any later than that. I change  
24 over law clerks in August. I don't like to have a trial  
25 bridge that.

1 MR. SKENYON: If I may ask the Court, when is the  
2 Rose Festival? We seem to have a history of trying this at  
3 the same time as the Rose Festival.

4 THE COURT: You don't like all those drunken  
5 sailors hanging out in the courtroom?

6 MR. SKENYON: Too many wandered in last time, but  
7 no.

8 MR. HEUSER: May and June.

9 THE COURT: Is that Mr. Heuser?

10 MR. HEUSER: Yeah. I think it's end of May or  
11 early June.

12 THE COURT: Early June mostly, that's right.

13 Mr. Heuser is a lot more familiar with these civic  
14 festivals than I am.

15 MR. SKENYON: We noticed that, Your Honor.

16 MR. SABER: Your Honor, while we were waiting for  
17 you, Mr. Skenyon and I realized we both do have time this  
18 week, so we'll be able to get a letter to Ms. Stephens by  
19 the end of the week.

20 THE COURT: All right. So let's shoot for June,  
21 that should work, and then we have the rest of the schedule.

22 Anything further today from Smith & Nephew?

23 MR. SKENYON: No, Your Honor.

24 THE COURT: From Arthrex?

25 MR. SABER: There was just one minor housekeeping

1 thing on the page limits on summary judgment. I believe we  
2 had come to an agreement, actually, and it just didn't get  
3 reflected in the report for the 04 paper of 50 pages for  
4 opening and response briefs and 25 for rebuttals. I  
5 apologize that that didn't get into the paper, but I believe  
6 we had an agreement on that.

7 THE COURT: That's fine. I tell people they can  
8 exceed the page limits all they want. I'm only going to  
9 read 35 pages, but you can write as much as you like.

10 Thank you. That will be allowed.

11 Anything further?

12 MR. SABER: No, Your Honor.

13 THE COURT: Thank you all. Good day.

14 MR. SKENYON: Thank you.

15 (Proceedings concluded.)  
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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

4/6/10

BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

DATE